IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 389 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JIGNESHKUMAR SURESHBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR HASMUKH C PATEL for Petitioner

MR HL JANI, APP for Respondent

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 08/09/2004

ORAL JUDGEMENT

1. This Revision Application arises from a judgment and order dated 22.1.2004 delivered by learned Sixth Joint Judicial Magistrate, First Class, Ahmedabad

(Rural), in Criminal Case No. 4634 of 2002, convicting the applicant for the offence proved against him under Section 66(1)(b) of the Bombay Prohibition Act, 1949, and as confirmed by learned Additional Sessions Judge, Ahmedabad (Rural), in Criminal Appeal No. 8 of 2004, vide his judgment and order dated 29th of May, 2004.

2. The fact which emerges from the record of the case discloses that the incident took place on 15th of August, 2002 at 17.30 hours near Kamodgam on public road. Complainant of this case Pravinsinh Shivaji Chavda, Head Constable, was on duty on the said date, and he found that on the road of Kamodgam, one person was found drunk and in disorderly behaviour. On inquiry, the person volunteered his name to be Jigneshkumar Sureshbhai Patel (applicant) resident of village Ghodasar. Pravinbhai Shivaji Chavda also found that the applicant was under the influence of consuming alcohol, his breath was smelling of alcohol, his eyes were red and were influenced by intoxication and the applicant was not able to control his own body. He was asked about some pass or permit for consuming liquor but it was found that the applicant had no such pass or permit with him. A panchnama was drawn by Pravinbhai Shivaji Chavda from 17.00 to 17.30 hours in the presence of panchas about the physical condition of the applicant and he filed a complaint before Aslali Police Station. Pravinsinh Shivaji Chavda was accompanying by Police Constable Rajubhai Gandabhai. After filing complaint and getting the same registered, Pravinsinh Shivaji Chavda started investigation and forwarded the applicant to the Medical Officer at Aslali Hospital, where the applicant was examined by Dr. Maheshbhai Narottamdas Chauhan, who found that, breath of the applicant was smelling alcohol, he was conscious, his both eyes were red and pupils were dilated. He came to the conclusion that the applicant was under the influence of alcohol and, therefore, according to the Bombay Prohibition (Medical Examination & Blood Test) (Gujarat Amendment) Rules, 1985,5cc blood was extracted from right hand of the applicant through disposable syringe and needle. The said blood was accordingly stored in a phial containing anticongulant and preservative. The phial was duly shaken after sealing the same. According to rule, Dr. Maheshbhai Narottamdas Chauhan duly filled-in Form A, B & C and forwarded the sample of blood to the Forensic Science Laboratory. Exh-15 opinion of Forensic Science Laboratory indicated that the said sample of blood contained 0.0802 per cent/W/V of Ethyl Alcohol which was exceeding the limit prescribed by the Bombay Prohibition (Medical Examination & Blood Test) (Gujarat Amendment)

Rules, 1985 of 0.05%. It is pertinent to note that Exh.15, a report from Forensic Science Laboratory also indicated that vide letter dated 15th of August, 2002, a phial containing blood of Shri Jignesh Suresbhai Patel was duly received by them on 19th of August, 2002 by R.P.P. It was also indicated by Exh. 15 that the said phial was perfectly sealed as per copy sent and intact device. It was also mentioned that the specimen copy of the seal was legible. The sample of blood came to be analyzed by Forensic Science Laboratory on 17th of September, 2002. From the above fact, a charge sheet against the present applicant came to be filed in the court of learned Judicial Magistrate, First Class, Ahmedabad (Rural) for the offences punishable under Section 66(1)(b) and Section 85 (1)(3) of the Bombay Prohibition Act, 1949 and for the offences punishable under Sections 110 and 117 of the Bombay Police Act.

3. Plea of the applicant came to be recorded vide Exh.3 where he pleaded not guilty and hence the prosecution was called upon to produce evidence to prove the charges. The prosecution examined panchas PW-1 Exh.4 Fakirmohmad Husainbhai and PW-4 Exh.9 Ratilal Ambalal Patel, but both of them did not support panchnama Exh.5. PW-2 Complainant Exh.6 Pravinsinh Shivaji Chavda stated that on the day of the incident, while he was on duty, he arrested applicant on finding him under the influence of alcohol. Complainant - Pravinsinh Shivaji Chavda is further corroborated by the evidence of Constable Rajubhai Gandabhai PW-3 Exh.8. PW-5 Exh.10 Dr. Maheshbhai Narottamdas Chauhan was examined who examined the applicant and extracted blood sample, while prosecution also submitted on record the complaint filed by Pravinsinh Shivaji Chavda at Exh.7, Medical Certificate Form "A" at Exh.13, office copy of Form-B at Exh.14, Form-C at Exh.15 and other documentary evidence.

4. After hearing the parties, learned Judicial Magistrate, First Class, came to the conclusion that having regard to the evidence of PW-5 Dr. Maheshbhai Narottamdas Chauhan, PW-2 Pravinsinh Shivaji Chavda Exh.6 and PW-4 Rajubhai Gandabhai, the case against the applicant for consumption of alcohol was proved beyond doubt, while the prosecution failed to prove the case against the applicant that the applicant was behaving in disorderly manner under the influence of alcohol, and so the charge against the applicant for offence under Section 85(1)(3) and under Sections 110 and 117 of the Bombay Police Act could not be proved by the prosecution.

5. Therefore, the present applicant came to be

convicted by learned Sixth Joint Judicial Magistrate, First Class, vide his judgment dated 22.1.2004 for the offence proved against him under Section 66(1)(b) of the Bombay Prohibition Act, 1949, and was sentenced to undergo simple imprisonment of three months and to pay fine of Rs.500/- in default to undergo simple imprisonment of 10 days. He was acquitted for the charges levelled against him under Section 85(1)(3) of the Bombay Prohibition Act as well as for the charges levelled against him under Sections 110 and 117 of the Bombay Police Act.

6. Challenging this judgment in respect of his conviction the applicant filed Criminal Appeal in the Court of Sessions Judge at Ahmedabad (Rural), but Appeal came to be dismissed by learned Additional Sessions Judge, vide his judgment and order dated 29th of May, 2004. Being aggrieved by the above said two decisions, this Revision Application is preferred by the applicant under Sections 397 and 401 of the Criminal Procedure Code.

7. Learned Advocate Mr. Hasmukh C. Patel for the applicant and learned APP Mr. H.L. Jani for the respondent were heard.

8. During hearing, learned Advocate for the applicant admitted that he had no submissions to make so far as the merits of the matter is concerned, but he advanced his submission in respect of the quantum of sentence. He stated that the applicant is the only member of his family residing in India and all other members of his family reside in foreign country. If the sentence of the accused is not reduced, he would not be able to go to foreign to join his family and will be all alone in India. This is likely to affect the future of the applicant as well as his mental condition and, therefore, according to learned Advocate for the applicant, the sentence awarded be reduced to the payment of fine, and the applicant be exempted from the sentence of imprisonment.

9. Having considered the submission on record and having gone through the record of both the courts below entirely, despite above submission, endeavour is made to go through the evidence thoroughly as a revisional court. On thorough scrutiny of evidence recorded it is found that the fact that the accused came to be apprehended on 15th August, 2002 at about 17.00 hours, is established through the clinching evidence of PW-2 Exh.6 Pravinsinh Shivaji Chavda and PW-3 Rajubhai Gandabhai who was

Constable accompanying PW-2 Pravinsinh Shivaji Chavda. Both the witnesses are independent witnesses. They have withstood scorching cross-examination on behalf of the defence but nothing is brought about to come to the conclusion that the two independent police officers while discharging their duties, would file a false case against the applicant. Both of them are further corroborated by Medical Officer PW-5 Exh. 10 Dr. Maheshbhai Narottamdas Chauhan, where he stated that he examined applicant and was found him under the influence of alcohol and, therefore, he gave certificate in Form - A, following the rules he extracted 5 cc blood from the right hand joint of the applicant, and the sample of blood was transferred to phial which was duly sterilized. Phial was containing anticongulant and preservative. He used disposable needle and syringe. He thereafter duly sealed the phial and gave certificate in Form-B and Form-C. He has been extensively cross examined by the defence, but nothing is brought about in cross-examination to come to even a remote conclusion that this witness committed any breach of the Bombay Prohibition (Medical Examination and Blood Test) (Gujarat Amendment) Rules, 1985 in collecting the sample of blood or to forward the same for Forensic Science Laboratory. It is pertinent to note that in his examination-in-chief, PW-5 stated that he obtained left hand thumb impression of the applicant in Form-A Exh.13 and this fact remained unchallenged during trial. Thus, after dispassionately examining the matter in revisional jurisdiction, it is found that the conviction as awarded by learned Sixth Joint Judicial Magistrate, First Class, Ahmedabad (Rural) and as confirmed by the appellate Court i.e. Sessions Court, Ahmedabad (Rural), cannot be interfered with.

10. Main thrust of argument on behalf of the applicant is about reduction in sentence to the extent less than minimum prescribed by the provision. The applicant might be residing alone in India and his family members might be residing in foreign country. It may be that to undergo imprisonment, he would be alone and no family members would be available in this country to take his care. Even if this plea to be true, the question is, whether this plea can be considered to be constituting special circumstance to inflict punishment even less than minimum prescribed. It is pertinent to note that Section 66(1)(b) prescribes minimum punishment to be inflicted on establishing the offence against the accused. That minimum punishment is simple imprisonment of three months and Rs. 500/- fine for the first offence. Undoubtedly, there is nobody's case that it is not the first offence of the applicant and hence rejecting this very plea for

inflicting less than minimum sentence, learned Magistrate thought it fit to inflict the minimum sentence of three months simple imprisonment and fine of Rs.500/-. Same plea is raised in this Court in this Revision Application for reduction of sentence. When any statute prescribes minimum sentence to be inflicted upon accused, with a discretion to award less than minimum in special circumstances, leads to only conclusion that to inflict sentence less than minimum, there must be special circumstances and special reasons for the court to inflict sentence less than the minimum prescribed. The reason advanced for the reduction of sentence to the extent of less than minimum prescribed, could hardly be said to be a reason even for reduction of sentence, nonetheless, special reasons for inflicting sentence less than the minimum prescribed. The plea that since the whole family of the applicant reside in foreign country and that he would be all alone in this country, is not an impressive or a special reason, to interfere with the sentence awarded by learned Judicial Magistrate, First Class, which is minimum prescribed by the statute. Unfortunately, the contention for reduction of sentence also will have to be rejected.

10. In the above view of the mater, this Revision Application stands dismissed. Rule is discharged.

11. The present applicant vide order of this Court dated 29th of June, 2004, has been released on bail after suspending the substantive sentence. In this view of the matter, the bail bond of the applicant shall stand cancelled and on request made on behalf of learned Advocate for the applicant, time to surrender is granted to the applicant till 21.10.04. However, it is made clear that this period shall not be extended in any case.

(J.R.Vora, J.)

p.n.nair